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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 534

OKLAHOMA FARM BUREAU and LEWIS H. MUNN,
Appellants,

VERSUS

HARRY R. MOSS, ET AL.,
Appellees.

RESPONSE TO MOTION TO DISMISS

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At the outset we think it is pertinent to note, without any reflection whatever upon counsel, but simply as a statement of fact, that none of the principal parties formerly represented by counsel at the outset of this case, have undertaken to challenge the appeal of Oklahoma Farm Bureau and Mr. Munn. Mr. Reynolds was originally counsel for the former Governor of the State of Oklahoma, and filed pleadings in his behalf. Mr. Edmondson is no longer Governor of Oklahoma; and the present Governor, although substituted as a party for the previous Governor, has acquiesced in our appeal by not having filed any Motion to Dismiss the same.

It is also interesting to note that the former State Treasurer, Mr. Burkhart, and the State Election Board were

originally represented in their governmental capacities by Mr. Stagner and Mr. Powers. The present State Treasurer is now represented by the Attorney-General, Mr. Charles Nesbitt, together with the State Auditor and the members of the Oklahoma Tax Commission; and none of them have seen fit to challenge the appeal of Oklahoma Farm Bureau and Mr. Munn; but on the other hand, have themselves through the Attorney General filed a Jurisdictional Statement challenging the order of the Federal Court.

It would therefore appear that none of the attorneys who have filed the Motion to Dismiss represent any of the principal figures in the original trial and hearing of this cause.

We think it is therefore significant to observe that neither the present Governor nor any of the elected officials of this State are seeking to deprive Oklahoma Farm Bureau and Mr. Munn of the privilege of presenting their appeal to this Court.

We wish, however, to logically, factually, and legally dispose of the motion filed herein to dismiss our appeal.

The appellees in substance insist that Oklahoma Farm Bureau and Mr. Munn were the prevailing parties; that they were not aggrieved; and that they therefore have no standing for the purpose of appeal.

We would quote again the statutory authority for this appeal (Title 28, U.S.C., § 1253):

> "*Direct appeals from decisions of Three Judge Courts.* Except as otherwise provided by law, *any party may appeal* to the Supreme Court from *an order, granting*, or denying, after notice and hearing,

> *an* interlocutory or permanent *injunction* in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a District Court of three Judges." (Italics ours.)

There is no contention that under Section 2281, Title 28, U.S.C., this is not a proceeding "required by Act of Congress to be heard and determined by a District Court of three Judges."

Apparently the movants overlook the fact that an injunction was granted in this case; and that the election board was:

> "enjoined and restrained from accepting filings or conducting elections in any manner inconsistent with the provisions of this order and the statutes of the State of Oklahoma not inconsistent herewith"—See Appendix Jurisdictional Statement LXXI.

Movants admit in their motion that the order of apportionment rendered in connection with the injunction decree was not in conformity with the Constitution of the State of Oklahoma as it then existed.

Apparently appellants contend, superficially at least, that the order of injunction was not inconsistent with the position taken by the pleadings of Oklahoma Farm Bureau and Mr. Munn.

With this contention, we must violently disagree

At the time the original answer of these appellants was filed in Federal Court there was then pending an Initiative Petition; and it was then imminent that the Legislature would soon be in session. In view of these facts,

our answer suggested that in the event the petition and the proposed Amendment to the Constitution then pending were adopted, that this action should be dismissed. That if such petition should fail to pass, the Legislature should have a reasonable length of time within which to effect a constitutional reapportionment. That in the event neither the Initiative Petition then pending nor appropriate legislation were adopted, "then that this Court proceed to make reapportionment *in accordance with the present existing Constitutional formula.*"

Our position was made crystal clear in our answer when we stated:

> (See Appendix—Answer of Intervenors, Oklahoma Farm Bureau and Lewis H. Munn—Appendix to Motion, pp. (v) (vi) (vii)):
>
> "The Initiative provision was also an integral part of the Oklahoma Constitution in 1907, when it was admitted to the Union; and is entitled to the same weight and consideration as every other portion of our Constitution. It would be assumed that it was a safeguard inserted in our Constitution, patterned after the 1902 provision of the Oregon Constitution, to provide a remedial process by which any inequities in Legislative representation, such as now exists, could be rectified by the citizens adversely affected.
>
> "In this further connection, your intervenors assert, and it should be noted, that the plaintiff Mr. Moss, states that he brings this action for himself and all persons similarly situated. Presumably, and obviously, he refers by the term 'those similarly situated,' to all the legal voters in the large metropolitan centers of Oklahoma. This being true, since the metropolitan centers embrace a majority of the legal voters of Okla-

homa, the plaintiff and the class he represents are in a position to implement and effectuate the present Constitutional formula by a favorable vote on the impending Initiative Petition."

It is true that in the original answer of these appellants, we outlined a formula which it was felt would be more equitable; but we emphasized the fact that such formula *"should be adopted through our regular Constitutional processes"* (movant's Appendix, p. ix).

This position was further emphasized in our answer when we stated (movant's Appendix, p. ix):

> "Intervenor reiterates its opinion, however, that whatever merit may inherently appear in the Oklahoma Farm Bureau formula, the Constitutional formula must first be implemented; and any changes or modifications should thereafter be adopted through the regular Constitutional processes provided by the Oklahoma Constitution."

Following this, then, in the prayer of the Answer of these appellants, filed in the Federal Court, these appellants continued in their prayer for relief as follows:

> "WHEREFORE, your intervenors pray:
>
> "(1) That this action be continued until ten (10) days after an election is held on the pending Initiative Petition; that in the event said Petition and amendment to the Constitution is adopted by the voters of the State of Oklahoma, that this action be then dismissed;
>
> "(2) If the same should fail to pass and be adopted, that this Court then continue this cause to a date subsequent to the convening date of the Oklahoma Legis-

lature, *affording it a reasonable time within which to effect a Constitutional re-apportionment;*

"(3) In the event *neither the Initiative Petition, nor appropriate Legislation is adopted*, then that this Court proceed to make re-apportionment *in accordance with the present, existing, Constitutional formula.*"

Notwithstanding the position and the prayer embraced in the answer of these appellants, movants contend that none of the questions presented in our Jurisdictional Statement were raised in our pleadings. By careful reading of our answer, the Court will find that each and every question presented by this appeal, except No. 5 and No. 6, were covered by our answer.

These appellants insisted (movant's Appendix, p. viii):

"It is cognizant of the fact that at least one house should be based substantially on population; but adheres to the philosophy that the other house should certainly bear a definite relation to geography. Otherwise, if both houses should be based solely on population, there would be no occasion for a bicameral legislative assembly; and that the result would be purely unicameral."

It insisted that (movant's Appendix, p. ix):

"The Constitutional formula must first be implemented; and any changes or modifications should thereafter be adopted through the regular Constitutional processes provided by the Oklahoma Constitution."

These announcements of position in addition to the prayer of these appellants certainly constituted adequate grounds for all of the questions presented with the exception of Questions 5 and 6.

In addition to the answer filed by these appellants in the original case, and promptly following the Interlocutory Order which the Court entered on July 31, 1962, these appellants filed with the Clerk of the United States District Court for the Western District of Oklahoma their "Notice of Appeal to the Supreme Court of the United States," and which was a pleading filed with the lower court, and which notice embraced the following questions:

> "1. Does the Federal Court have the right, the authority and the jurisdiction to direct or decree reapportionment of the Legislature under a formula devised by it which violates the Constitution of a State, which provides for a republican form of government, and which Constitution was approved and ratified by the United States Government on admission of such State to the Union subsequent to the adoption of the Fourteenth Amendment to the United States Constitution?
>
> "2. Does the Federal Court have the right, the authority and the jurisdiction to direct a decree reapportionment of the Legislature in a State whose Constitution provides for amendment to the Constitution by initiative petition, and notwithstanding the fact that such an initiative petition regarding re-apportionment has been filed, but not yet voted upon?"

Subsequent thereto, and in June 1963, as appears from the record, these appellants also filed with and in the Federal Court, proposed Findings of Fact and Conclusions of Law in which they again called attention to facts which justify and would authorize all of the questions presented by this appeal, including questions 5 and 6, which involve the pendency of the referendum on the proposed Constitutional Amendment.

All of these pleadings the Court had before it at the time of the rendition of its Final Decree.

AUTHORITIES

The legal authorities cited by movant are not applicable (See Appendix 1 attached hereto).

The right of these appellants to appeal to the Supreme Court is granted under Title 28, § 1253 U.S.C. *supra*. These appellants were parties to that action. An injunction was granted, enjoining the election board from accepting any filings for legislative office except those who offered to file in accordance with the apportionment decree spelled out by the Court. This apportionment decree was in direct violation of the Constitution of Oklahoma or as such Constitution may hereafter be amended. These appellants have at all times in their pleadings and in their appearances and in their arguments, insisted that any such reapportionment must be in conformity with the Oklahoma Constitution, or as it may be amended, in accordance with Oklahoma Constitutional processes. The injunction does violence to the Oklahoma Constitution, and ignores our Constitutional remedy by the Initiative and Referendum.

CONCLUSION

It is respectfully submitted that the injunctive decree constitutes a denial of the relief suggested by these appellants. It violates the Constitution of Oklahoma. It ignores the inherent remedy afforded the plaintiffs by the Oklahoma Constitution under the Initiative and Referendum.

These appellants are aggrieved by the Order; and again may we suggest that not even the plaintiff, not even the Governor, not even the Attorney General, and not even any of the state officials have objected to our lodging this appeal; and that by virtue of their not having filed a Motion to Dismiss, they have tacitly agreed that our appeal should be docketed and heard by the Supreme Court of the United States.

Respectfully submitted,

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December, 1963.

CERTIFICATE OF SERVICE

I, Frank Carter, attorney for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of ~~November~~ December, 1963, I served copies of the foregoing Response to Motion to Dismiss on the several parties thereto, as follows, by mailing copies in duly addressed envelopes, with first-class postage prepaid to their respective attorneys of record, as follows:

Sid White, Commerce Exchange Bldg., Oklahoma City, Oklahoma; John E. Wagner, 1st Nat'l Bldg., Oklahoma City, Oklahoma; Norman E. Reynolds, Jr., 1st Nat'l Bldg., Oklahoma City, Okla.; Delmer L. Stagner, Liberty Bank Bldg., Oklahoma City, Okla.; James A. Rinehart, El Reno, Okla.; Charles Nesbitt, Attorney General, State Capitol, Oklahoma City, Okla.; Fred Hanson, Assistant Attorney General, Capitol Bldg., Oklahoma City, Okla.; Albert D. Lynn, c/o Oklahoma Tax Comm'n, State Capitol, Oklahoma City; E. J. Armstrong, c/o Oklahoma Tax Comm'n, Oklahoma City, Oklahoma, and Leon Hirsh, Oklahoma Natural Bldg., Oklahoma City, Okla.

Frank Carter

FRANK CARTER

APPENDIX

APPENDIX I

Lindheimer, et al v. Illinios Bell Telephone Co., 292 U. S. 151, 54 S. Ct. 658 (1934)

Syllabus #10. Telephone company which secured decree in its favor in District Court, held not entitled to prosecute appeal for purpose of procuring review of findings of court with respect to value of company's property or other findings. (Judicial Code §266-28 USCA §380).

Paragraph #10, page 668. The company was successful in the District Court and has no right of appeal from the Decree in its favor. The company is not entitled to prosecute such an appeal for the purpose of procuring a review of the findings of the court below with respect to the value of the company's property or the other findings of which it complains. Its contentions in these respects have been considered in connection with the appeal of the State authorities and the City. The appeal of the company is dismissed—*New York Telephone Company* v. *Maltbie, et* al, 291 U.S. 645, 54 S. Ct. 443 (1934), 78 L. Ed.

New York Telephone Co. v. Maltbie, 291 U.S. 645, 54 S. Ct. 443 (1934).

Syllabus. Where telephone company procured permanent injunction unqualifiedly restraining as confiscatory, inforcement of public service commission's rate orders, it could not appeal from portions of decree fixing value of its property for 1924, 1926, and 1928 and rate of return to be allowed, since such portions would not be res judicata in event of further legislative action by commission.

CAVEAT: The telephone company secured its injunction but appealed the portion of the decree fixing value of its property. In denying the appeal, the court cited several cases, all of which hold that the fixing of valuation and rate of return by a State public service commission, is

a legislative act and any decision by a Federal Court would not be res judicata on the Commission acting in its legislative capacity.

Electrical Fillings Corporation v. Thomas & Betts Co., et al., 307 US 241, 59 S. Ct. 860 (1939)

Syllabus 3. Although District Court had dismissed bill in patent infringement suit for failure to prove infringement, Circuit Court of Appeals had jurisdiction to entertain defendant's appeal from so much of the decree as adjudicated one of claims valid, not for purposes of passing on merits, but to direct reformation of decree so as to eliminate adjudication concerning validity. (Judicial Code 128, as Amended, 28 USCA §225)

Par. 1-3. A party may not appeal from a judgment or decree in his favor for the purposes of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But here, the decree itself purports to adjudge the validity of Claim #1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this Court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree. See Gully v. Interstate Natural Gas, 292 US 16, 54 S. Ct. 565, 78 L. Ed. 1088.

CAVEAT: The Gully case merely holds that the action considered in the case was not proper for a three-man Court, and remanded to a one-man Court.

Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 306 US 204, 59 S. Ct. 480 (1939)

Suit brought by Brashear against Public Service Comm. to restrain the enforcement of the Missouri Bus & Truck

Act; Public Service Comm. filed a counter-claim seeking an accounting from plaintiffs for fees due to the State under the Act for the use of public highways. The public service commission of the State of Missouri appealed seeking review of the paragraph of the Decree, as amended, dismissing the counter-claim. The case holds that the public service comm. was granted the injunction and was the successful party, could not appeal as to the dismissal of the counter-claim alone, as the only provision for a direct appeal was an appeal as to the injunction itself.

The Court says:

> "No appeal has been taken to review the decree denying the injunction—this court is without jurisdiction. Sec. 266, as originally enacted applied only to cases in which an interlocutory injunction was granted or denied, and the purpose was to make interference by such an injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of three judges was likely to secure. (several cases cited)"

69 A.L.R. 2d 701:

The general rule stated in § 19A Supra under which the prevailing party cannot appeal from a judgment for the purpose of attacking adverse findings is not without exceptions. The United States Supreme Court has stated that a prevailing party has the right to appeal from those parts of a judgment in his favor which are based upon a finding of law or fact adverse to his interest where the finding is essential to the court's determination of the controversy, and, hence, in the absence of an appeal, would form the basis for collateral estoppel. Partmar Corp. v. Paramount Pictures Theatres, Corp. (1954) 347 US 89, 98 L. Ed. 532, 74 S. Ct. 414.

In footnote 6 of the Partmar case, the Court points out that the finding and conclusion of law in support of the

judgment in favor of the defendant were essential to the determination of the plaintiff's claim for possession of the theatre, and that it is only when a finding of law or fact is not necessary for a judgment, that the prevailing party may not appeal and the finding does not form the basis for collateral estoppel.

Footnote 6, Partmar Case: While Partmar did not appeal, it might have. The finding and conclusion of law just quoted were essential to the determination of Paramount's claim for possession of the theatre. Paramount's position after this court's reversal of the franchise portion of the New York decree, was that the agreements were invalid under the Federal Anti-Trust Statutes as a product of an illegal conspiracy. It is only when a finding of law or fact is not necessary for a decree that the prevailing party may not appeal, and the finding does not form the basis for collateral estoppel. This is shown by the case cited to support the statement as to appeal in Lindheimer v. Illinois Bell, New York Telephone v. Maltbie, Electrical Fillings Corp. v. Thomas. Electrical Fillings Corp. v. Thomas stated the practice negatively. "A party may not appeal . . . findings . . . not necessary to support the decree." Professor Scott, *Collateral Estoppel By Judgment*, 56 Harvard Law Review-I, concurs in this view. Re Statements, Judgments, §68 Reeves "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, determination is conclusive between the parties in a subsequent action, on a different cause of action, except as stated in §69, 71 & 72". Section 69(2) "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." Is immaterial because the conspiracy determination was essential for Paramount's defense.